IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-79

JESSE W. HOWARD, JR., *Petitioner*

*v.*

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1974

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JESSE W. HOWARD, JR., *Petitioner*

*v.*

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA**

*To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Petitioner, Jesse W. Howard, Jr., prays that a Writ of Certiorari issue to review the Opinion and Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Reconsideration of Denial of Petition for Allowance of Appeal, the consequences of which upheld the Order of the Superior Court of Pennsylvania, Philadelphia District, affirming the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, denying Petitioner's Motion for a New Trial following a conviction of two counts of burglary, two counts of larceny, and one count of conspiracy.

## OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal and denying Petitioner's Petition for Reconsideration of Denial of Petition for Allowance of Appeal, the Opinion of the Superior Court of Pennsylvania, Philadelphia District, affirming the judgment of sentence and Orders of the Court of Common Pleas, Criminal Division, of Lancaster County, Pennsylvania, are attached hereto.

## JURISDICTION

The Order of the Supreme Court of Pennsylvania was filed May 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and Rule 22(1) of the United States Supreme Court Rules.

## QUESTIONS PRESENTED

1. Whether the introduction of testimony by the prosecution that Petitioner was advised of his *Miranda* rights when arrested but chose to remain silent, and not to make any statements, and the judge's comment upon this testimony during his charge to the jury, constitutes reversible error?

2. Whether, in the absence of an evidentiary hearing, or sufficient evidence in the record, counsel's failure to object to prosecution testimony that Petitioner was advised of his *Miranda* rights when arrested but chose to remain silent, and not to make any statements, and the judge's comment upon this testimony, can be held to be a waiver of Petitioner's Fifth Amendment privilege or that said failure to object was part of trial strategy?

3. Whether the Superior Court of Pennsylvania applied the proper standard in determining that a jury's awareness through Commonwealth testimony of a defendant's silence at time of arrest and constitutional warnings is not, under the circumstances existing in the present case, a defect so fundamental as to affect the merits of justice of this case or to offend against the fundamentals of a fair and impartial trial?

4. Whether, in a case where the evidence against the defendant is circumstantial and there is other substantial evidence to support acquittal, the introduction of testimony by the prosecution that Petitioner was advised of his *Miranda* rights when arrested but chose to remain silent, and not to make any statements, and the judge's comment upon this testimony during his charge to the jury, is harmless error beyond a reasonable doubt?

## CONSTITUTIONAL PROVISIONS INVOLVED

1. The United States Constitution, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

2. The United States Constitution, Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

## STATEMENT OF THE CASE

Petitioner was arrested on July 19, 1971, in Lancaster County, Pennsylvania, and charged with two counts of burglary, two counts of larceny, and one count of conspiracy. He was indicted by the Grand Jury of Lancaster on these charges at Nos. 1895, 1898, and 1900 of 1971. On March 29, 1972, he was tried before Judge William G. Johnstone, Jr., and a jury of the Court of Common Pleas of Lancaster County and found guilty on all counts. Trial counsel, Raymond R. Smith, Esquire, of York County, Pennsylvania, made oral Motions for a New Trial and in Arrest of Judgment which he reduced to writing within seven (7) days. However, he failed to file supplemental reasons after the Notes of Testimony were transcribed, and failed to file a brief or appear and argue the motions, and they were dismissed at bar without argument or Opinion. William A. Atlee, Jr., Esquire, was subsequently retained to perfect an appeal to the Superior Court of Pennsylvania, Philadelphia District, from the Judgment of Sentence. An Order of the Superior Court, filed November 16, 1973, affirmed the Petitioner's conviction for two counts of burglary, two counts of larceny, and one count of conspiracy. The Opinion of the Superior Court was written by Judge Jacobs, with Judges Hoffman, Cercone, and Spaeth concurring in the result. A copy of said Opinion is attached hereto. There was no Dissenting Opinion filed. Subsequently, the Pennsylvania Supreme Court on March 25, 1974, denied Petitioner's Petition for Allowance of Appeal from the Superior Court. The Petitioner then petitioned for the reconsideration of the denial of the Petition for Allowance of Appeal from the Superior Court. This Petition was denied on May 8, 1974.

Petitioner's Appeal from the Judgment of Sentence requested the Pennsylvania Superior Court to consider two issues:

1. Whether the lower court erred in denying Petitioner's Motion for Sequestration of Witnesses at

the initiation of trial, since the case was based solely upon circumstantial evidence and tentative eye-witness identification by different people at different times and places; and

2. Whether a witness' statement that Petitioner had remained silent upon being arrested and notified of his constitutional rights, and the judge's reference to this testimony in summarizing the evidence, constituted grounds for reversal.

At the trial of the case at bar, police officer, Ronald Jones of East Donegal Township, testified that he read the Petitioner his *Miranda* rights, then asked him that having these rights in mind, did he wish to talk to them. He testified that Petitioner responded "No", and that he did not wish to talk to the officers or to make any statement (N.T. 205-206). This testimony was repeated on cross-examination in response to a question by Petitioner's counsel. Judge Johnstone, in his charge to the jury, commented on the decision of the Petitioner to remain silent:

> "They were advised of their constitutional rights and neither of them wished to say anything, which is their privilege, their constitutional right." (N.T. 334)

After the failure of the Pennsylvania courts to remedy the violation of Petitioner's Fifth Amendment right to remain silent, this Petition for Writ of Certiorari followed.

## REASONS FOR GRANTING THE WRIT

1. *Whether the introduction of testimony by the prosecution that Petitioner was advised of his Miranda rights when arrested but chose to remain silent, and not to make any statements, and the judge's comment upon this testimony during his charge to the jury, constitutes reversible error?*

It is a well-settled principle of constitutional law that a criminal defendant may not be penalized for the exercise of his Fifth Amendment privilege. Neither the prosecutor nor the trial judge may directly comment to the jury concerning the defendant's failure to testify, *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965). There can be no comment or adverse inference drawn from refusal of a criminal defendant to testify since this would constitute the imposition of an impermissible penalty by the court in the exercise of a constitutional privilege.

> "It cuts down on the privilege by making its assertion costly . . . What the jury may infer, given no help from the Court is one thing. What it may infer when the Court solemnizes the silence of the accused into evidence against him is quite another." *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 564, 14 L.Ed. 2d 110 (1965).

This principle has been extended to apply to the conduct of the trial, prohibiting any testimony or comment by the trial judge on the defendant's decision to remain silent in the face of charges pressed against him. It has been held that the testimonial reference to an accused's silence at the time of arrest and questioning is a constitutionally impermissible violation of the accused's Fifth Amendment rights. *Commonwealth v. Haideman*, 449 Pa. 367, 296 A.2d 765 (1972); *Baker v. United States*, 357 F.2d 11 (5th Cir. 1966).

In the trial of the case at bar, Petitioner's exercise of his Fifth Amendment privilege was testified to by police officer, Ronald Jones, of East Donegal Township (N.T. 205-206). He stated that he read the Petitioner his *Miranda* rights, then asked him that having these rights in mind, did he wish to talk to them. The Petitioner responded "No", that he did not wish to talk to the officers or to make any statement. Judge Johnstone, in his charge to the jury, commented on this decision of the Petitioner to remain silent:

> "They were advised of their constitutional rights and neither of them wished to say anything, which is their privilege, their constitutional right." (N.T. 334).

The introduction of this testimony and the judge's comment upon it was an impermissible penalty for the exercise of Petitioner's Fifth Amendment right, prejudicing him in the eyes of the jury. Combined with the facts that Petitioner chose not to take the stand in this particular case, the adverse inference which would be drawn by the jury is self-evident. The comments on Petitioner's silence are especially damaging here, where his silence referred to occurred at the moment of arrest. "We would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968).

2. *Whether, in the absence of an evidentiary hearing, or sufficient evidence in the record, counsel's failure to object to prosecution testimony that Petitioner was advised of his Miranda rights when arrested but chose to remain silent, and not to make any statements, and the judge's comment upon this testimony, can be held to be a waiver of Petitioner's Fifth Amendment privilege or that said failure to object was part of trial strategy?*

The Pennsylvania procedural rule is such that if the admission of evidence is to be reviewed, an objection to

the introduction thereof, with stated reasons, should be noted of record at trial:

> "However, this general rule will not be applied where there is basic and fundamental error which affects the merits or justice of the case, or, as some cases express it, offends against the fundamentals of a fair and impartial trial or deprives the defendant of that fundamental fairness essential to the very concept of justice, and, hence, denies him due process of law guaranteed by the Fourteenth Amendment." *Commonwealth v. Butler*, 442 Pa. 30, 272 A.2d 916, 918 (1971).

After reiterating the general rule that objections should be noted of record at trial, the Pennsylvania Supreme Court, in *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A.2d 765 (1967), held:

> "An insistence on compliance with this procedural regulation serves a legitimate state interest. However, an individual foregoes the privilege of asserting a claim of violation of constitutional rights only if he knowingly and intelligently decides not to insist thereon, or if his counsel for purposes of trial strategy decides not to raise the question." 423 Pa. at 546, 226 A.2d at 768.

Thus, under Pennsylvania procedure, Petitioner did not waive his constitutional right not to have his silence commented upon because of his counsel's failure to object.

The Superior Court's contention that the error was not so fundamental as to waive the requirement of a timely objection is contrary to this Court's holding in *Griffin*—that comment on a defendant's silence was and must be fundamental error.

The question of when and how defaults in compliance with state procedural rules can preclude the consideration of a federal question by this Court is itself a federal question. *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed.2d

408, 85 S.Ct. 564 (1965). This Court has repeatedly held that an individual foregoes the privilege of asserting a claim of violation of his constitutional rights only if he knowingly and intelligently decides not to insist thereon, or if his counsel, for purposes of trial strategy, decides not to raise the question. Waiver of constitutional rights is not lightly inferred. Every reasonable presumption against waiver is indulged by the Court. *Emspack v. United States*, 349 U.S. 190, 75 S.Ct. 687, 90 L.Ed. 997 (1955); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938).

Where fundamental constitutional rights are involved, the courts will not rigidly apply procedural rules to the derogation of constitutional rights. *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). The decision on state grounds does not preclude review by this Court, which must decide whether that decision is consistent with due process requirements of the Fourteenth Amendment. *Lynumm v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); *Kerr v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

It is inconceivable that a defendant's failure to object to the prosecution and trial judge's comment on his silence was part of trial strategy in a case where the evidence was circumstantial, for it is precisely this type of case where such comment is most likely to be harmful. *Fontaine v. California*, 390 U.S. 593, 85 S.Ct. 1229, 20 L.Ed.2d 154 (1968). There is insufficient evidence in the record to establish that Petitioner waived his constitutional rights not to have his silence commented upon or that counsel's failure to object to the prosecutor's and judge's comments were part of trial strategy. Repetition by Petitioner's counsel of a question already asked by the prosecutor is not, in itself, sufficient to prove waiver. In the absence of any evidentiary hearing concerning waiver or of sufficient evidence in the record to establish waiver, this Court is not precluded from remedying the violation of Petitioner's right to remain silent because of Petitioner's

counsel's failure to object to the prosecutor's and judge's comments on his silence. *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

3. *Whether the Superior Court of Pennsylvania applied the proper standard in determining that a jury's awareness through Commonwealth testimony of a defendant's silence at time of arrest and constitutional warnings is not, under the circumstances existing in the present case, a defect so fundamental as to affect the merits of justice of this case or to offend against the fundamentals of a fair and impartial trial?* .

If one could look at the Superior Court's finding that the error was not so fundamental as to offend justice as meaning that the error was harmless under the circumstances of this case, then the Court did not apply the proper standard in so determining. When fundamental error has been committed, reversal is required unless the error is harmless beyond a reasonable doubt. There is no showing in the Record of Opinion of the Superior Court of Pennsylvania that the Court applied the test that the state has the burden of proving the error was harmless beyond a reasonable doubt. *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824 (1967).

4. *Whether in a case where the evidence against the defendant is circumstantial and there is other substantial evidence to support acquittal, the introduction of testimony by the prosecution that Petitioner was advised of his Miranda rights when arrested but chose to remain silent, and not to make any statements, and the judge's comment upon this testimony during his charge to the jury, is harmless error beyond a reasonable doubt?*

That the error was fundamental is supported by this Court's decisions in *Anderson v. Nelson*, 390 U.S. 523,

88 S.Ct. 1133 (1968); *Fontaine v. California*, 390 U.S. 593, 88 S.Ct. 1229 (1968). In these cases, this Court held that a case in which the evidence against the defendant is mainly circumstantial, is precisely that type of case where commenting on a defendant's silence is most harmful. When there is evidence supporting acquittal, the error is not harmless beyond a reasonable doubt. The evidence against Petitioner was circumstantial. There was also ample evidence to support Petitioner's acquittal. The Petitioner introduced an alibi defense, presenting four (4) witnesses who placed him in York, Pennsylvania, some 15-20 miles from the scene, at approximately the same time the burglaries and larcenies were committed. The Petitioner's co-defendant also introduced three (3) alibi witnesses whose testimony was substantially the same as those of Petitioner Howard's.

Petitioner should not be deprived of his liberty based upon a conviction which is tainted by the violation of Petitioner's Fifth Amendment right to remain silent.

## CONCLUSION

The circumstances set forth in this Petition present to the Court a case in which the Petitioner was denied the full protection of his constitutional right to remain silent. It is violative of the basic concepts of due process of law that Petitioner be deprived of his liberty based upon a conviction which may have been, at least in part, obtained because of the violation of Petitioner's Fifth Amendment right. Such a result requires remedy by this Court.

The Petitioner accordingly prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the instant case.

Respectfully submitted,

GEISENBERGER, ZIMMERMAN,
PFANNEBECKER & GIBBEL

By: Robert L. Pfannebecker

William A. Atlee, Jr.
*Attorneys for Petitioner*

## APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Philadelphia 19107

May 9, 1974

Richard P. Muffort, Esq.,
Geisenberger, Zimmerman,
Pfannebecker & Gibbel
212-½ East King Street
Lancaster, Pa. 17604

In re: Commonwealth of Pennsylvania v.
Jesse W. Howard, Jr., Petitioner
No. 1222 Allocatur Docket

Dear Mr. Muffort:

Please be advised that the Court has entered the following Order on the Petition for Reconsideration of Denial of Petition for Allowance of Appeal:

"May 8, 1974
Petition Denied
Per Curiam."

Very truly yours,

LAURA E. LITCHARD
*Deputy Prothonotary*

LEL:mb
CC: Robert A. Longo, Esq.

## APPENDIX B

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Philadelphia 19107

March 25, 1974

Richard P. Nuffort, Esq.,
Geisenberger, Zimmerman,
Pfannebecker & Gibbel
212-½ East King Street
Lancaster, Pa. 17604

In re: Commonwealth of Pennsylvania v.
Jesse W. Howard, Jr., Petitioner
No. 1222 Allocatur Docket
(Nos. 1570/1573 October Term 1972)

Dear Mr. Nuffort:

Please be advised that the following Order has been entered on both the Petition for Allowance of Appeal and Peition for Supersedeas, in the above captioned matter:

"March 25, 1974
Petition Denied
Per Curiam."

Yours very truly,

LAURA E. LITCHARD
*Deputy Prothonotary*

LEL:mb
CC: Robert A. Longo, Esq.

## APPENDIX C

IN THE SUPERIOR COURT OF PENNSYLVANIA

PHILADELPHIA DISTRICT

Nos. 1570, 1571, 1572, and 1573 October Term, 1972.

COMMONWEALTH OF PENNSYLVANIA

*v.*

JESSE W. HOWARD, JR., *Appellant*

*Appeal from the Judgment of Sentence and Orders of the Court of Common Pleas, Criminal Division, of Lancaster County, at Nos. 1902, 1907, 1908, and 1911 of 1971.*

Filed: November 16, 1973

OPINION BY JACOBS, *J.*:

This is an appeal from a judgment of sentence and from orders imposing probation in a case in which the appellant was found guilty by a jury of two burglaries and related larcenies and two conspiracies to commit said burglaries.[1] A codefendant was found similarly guilty.

Issues presented involve the refusal of the lower court to allow reargument of post-trial motions and to allow the appellant to file additional post-trial motions *nunc pro tunc*, the refusal of the lower court to grant a motion for

1. Docket entries indicate that for one of the burglaries and larcenies, appellant was sentenced to pay a fine of $100, to pay costs of prosecution, and to undergo imprisonment in a state correctional institution for not less than 2½ nor more than 5 years; for the second, as well as for each conspiracy, he was placed on 5 years concurrent probation, with a requirement that he pay court costs and make restitution. As to the length of probation indicated with respect to the conspiracies, see the text infra.

sequestration of witnesses, and the occurrence of testimonial and judicial references to appellant's silence upon arrest and notification of constitutional rights.

A short summary of the Commonwealth's and appellant's cases will be useful to a disposition of the appeal. Testimony of prosecution witnesses was to the effect that two houses in Lancaster County, within three-quarters of a mile of each other, were burglarized on July 19, 1971, between 12:30 and 2:00 p.m. Certain items of personalty were taken from each.

Two men, one relatively taller than the other and wearing a yellow shirt, the other wearing a light shirt, were placed in back of one of the houses shortly before discovery of the burglary, by two residents of the house and their son, who observed them from a distance. Between 3 and 4 hours later, police intercepted a truck in which the appellant and his codefendant were passengers a few miles from the crimes. The driver of the truck had previously observed the two passengers as pedestrians, noted that their dress matched that of the men described above, and notified police that he would give them a ride.[2] Appellant was the shorter of the two and wore a white T-shirt. Both men were arrested.

Under the seat of the truck were found three silver dollars. A resident of the house burglarized around the same time as the house at which the men were sighted testified that among other items taken from his residence were three silver dollars; the two dates which he was able to recall of such coins matched those of two of the dollars taken from the truck. A ring which was said to have dropped from the truck when its door was slammed and to have been later shown to the same resident for identification was stated by him to have been one taken from his house.

A state policeman testified as to similarities between a heel print on a kicked-in door of the house at which the

2. The driver was a relative of the individuals mentioned in the text as having observed the two men in back of the burglarized house; he had been informed of the men's dress.

men were sighted and the heel of the right shoe of appellant's companion and codefendant. A resident of one of the houses stated that he thought that the ground had been dry before the burglary, but was not certain; a resident of the other house said that he was certain that it had been wet at the pertinent time.

Testimony presented by the defense, through a number of witnesses, was to the effect that the appellant had been in the city of York, York County, at the time of the burglaries. Neither appellant nor the codefendant testified.[3]

Following jury verdicts in the case, the appellant's attorney made motions in arrest of judgment and for a new trial. The motions were subsequently denied. Prior to sentencing, a new attorney for appellant sought leave to file new post-trial motions *nunc pro tunc* and for reargument, contending, according to appellant's brief on appeal, that a lack of diligence in the prior counsel's handling of the motions improperly penalized the appellant. The request was denied. On appeal, appellant requests this Court to consider two issues, neither of which his new counsel was permitted to press upon the lower court: whether the lower court erred in denying appellant's motion for sequestration of witnesses at the initiation of trial and whether a witness' statement that appellant had remained silent upon being arrested and notified of his constitutional rights,[4] and the judge's

3. No attempt has been made in this opinion to summarize the evidence with the degree of completeness or detail necessary for the disposition of issues other than those raised by the appellant.

4. On direct examination, a Commonwealth witness and police officer testified as to the constitutional rights he had read to the appellant and his codefendant upon arrest. He added:

> "And I asked them the following questions: 'Do you understand each of these rights as I have explained them to you?'
>
> " 'Having these rights in mind do you wish to talk to us?'
>
> " 'No.' The answers were not 'no' but they did not wish to talk to us or make any statement."

reference to this testimony in summarizing the evidence,[5] constitute grounds for reversal.[6]

Even should it be assumed that the two issues were not waived by appellant in the post-trial motion process, we are persuaded that he can not prevail on either one. "[T]he question of sequestration of witnesses is left largely to the discretion of the trial judge and his decision thereon will be reversed only for a clear abuse of discretion." *Commonwealth v. Kravitz*, 400 Pa. 198, 218, 161 A.2d 861, 870 (1960), *cert. denied*, 365 U.S. 846 (1961). *See Commonwealth v. Turner*, 371 Pa. 417, 88 A.2d 915 (1952); *Commonwealth v. Sloat*, 298 Pa. 10, 147 A. 834 (1929). Witness sequestration is normally impractical[7] or inadvisable, except in unusual circumstances. *Commonwealth v. Kravitz*, supra. The fact that evidence in a case is circumstantial does not in itself mandate sequestration,[8] nor do the identifications in the present case based upon clothing, or the conclusion of one witness that another was mistaken as to the dampness of the ground at the time of the burglaries, constitute sufficiently unusual circumstances to permit the finding of a clear abuse of discretion in the lower court's sequestration ruling.

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The officer testified that the appellant and his codefendant indicated that they understood the rights as read to them.

5. They [appellant and his codefendant] were advised of their constitutional rights and neither of them wished to say anything, which is their privilege, their constitutional right."

6. In view of our determination that the appellant's arguments on the two issues lack merit, it is unnecessary to determine the propriety of the lower court's refusal to permit post-trial motions *nunc pro tunc* and reargument. No harm has resulted to the appellant from the refusal.

7. The lower court, in disposing of appellant's motion, stated that he had no "place to put [the witnesses]." The attorney for appellant's codefendant suggested that perhaps the hall could be utilized, but the judge concluded that there was insufficient room there.

8. *See Commonwealth v. Kravitz*, 400 Pa. 198, 161 A.2d 861 (1960), *cert. denied*, 365 U.S. 846 (1961) (refusal to sequester witnesses in murder case in which evidence was circumstantial upheld).

With regard to the second issue raised, it may be true that a policeman's statement on direct examination that appellant had remained silent when arrested and advised of his rights, and the judge's recitation of that testimony in his charge, were objectionable.[9] But the record reveals that not only was no objection to the testimony made at the time of occurrence, but the appellant's attorney intentionally elicited the same testimony on cross-examination;[10] and the record contains no specific objection to the judge's reference as now complained of. "As a general rule, if the admission of evidence is to be reviewed, an objection to the introduction thereof, with stated reasons, should be noted of record at trial." *Commonwealth v. Jefferson*, 423 Pa. 541, 546, 226 A.2d 765, 768 (1967). And under Pa. R. Crim. P. 1119(b), effective August 1, 1968,[11] "[n]o portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate." *See Commonwealth v. Fell*, — Pa. —, — A.2d — (1973).

Although it has been held that the failure to object to admission of evidence and to specific errors in the court's charge will be overlooked in the case of fundamental error,[12] a jury's awareness through Common-

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9. *See Commonwealth v. Haideman*, 499 Pa. 367, 296 A.2d 765 (1972) (testimonial reference to accused's silence and request for lawyer at time of arrest held violation of accused's Fifth Amendment right).

10. "Q. Now, you testified here that you read Mr. Howard his rights and you advised him that any thing he was going to say you were going to use against him?

"A. Yes, sir.

"Q. And he didn't say anything?

"A. No, sir, he didn't."

11. The trial in the present case occurred in March of 1972.

12. *Commonwealth v. Johnson*, 402 Pa. 479, 167 A.2d 511 (1961) (failure of counsel to object to admission of certain inadmissible Commonwealth psychiatric evidence held unimportant in view of basic nature of defect); *Commonwealth v. Zapata*, 447 Pa.

wealth testimony of a defendant's silence at time of arrest and constitutional warnings is not, under the circumstances existing in the present case and without more, a defect so fundamental as to affect the merits or justice of the case or to offend against the fundamentals of a fair and impartial trial. *See Commonwealth v. Williams*, 224 Pa. Superior Ct. 298, 307 A.2d 289 (1973). Nor do we believe that the judge's recapitulation of this testimony, which the appellant had succeeded in repeating on cross-examination, was so unfair as to require invalidation of the trial.

It does not aid the appellant that a constitutional issue will not be deemed waived at trial if it is founded upon legal principles announced subsequent to trial[13] and if the failure to raise it did not result from trial strategy.[14] Even if it is assumed that the legal principles upon which the issue under discussion is premised were announced subsequent to trial,[15] the fact that appellant's trial counsel intentionally elicited the testimony now being objected to indicates that he felt it was beneficial to his client. It appears to us that the failure of appellant to say anything which would aid the prosecution when arrested may have been considered exculpatory by his

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322, 290 A.2d 114 (1972) (Pennsylvania said to employ rule that appellate review will be afforded claims of error in court's charge despite absence of objection at trial if error is basic and fundamental).

13. *See Commonwealth v. Jefferson*, 423 Pa. 541, 226 A.2d 765 (1967), *interpreted in Commonwealth v. Simon*, 446 Pa. 215, 285 A.2d 861 (1971).

14. *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A.2d 765 (1967).

15. *Commonwealth v. Haideman*, 449 Pa. 367, 296 A.2d 765 (1972), summarized in note 9, supra, which is relied upon by the appellant was decided subsequent to trial in this case; an earlier contrary decision in *Haideman*, followed by reargument, was handed down prior to the trial in the present case. 284 A.2d 757 (Pa. 1971). The principles upon which the final decision in *Haideman* was based arose in *Griffin v. California*, 380 U.S. 609 (1965), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

counsel in view of the concurrent absence of any items of evidence on his person and the circumstantial nature of the case against him.

Although the appellant is not therefore entitled to a reversal, an examination of the docket entries in the present case indicates that for each act of conspiracy appellant was placed on 5 years' probation, the probations to be concurrent with a sentence imposed on one of the burglaries and larcenies. If the entries are correct, an error has occurred. Since the maximum period of imprisonment for each conspiracy, under the Act of June 24, 1939, P.L. 872, §302, 18 P.S. §4302, *repealed*, Act of December 6, 1972, P. L. —, No. 334, §5, was 2 years, the period of probation indicated for each conspiracy would be excessive by 3 years and should be accordingly reduced. *See* Act of August 6, 1941, P.L. 861, §25, 61 P.S. §331.25; Act of June 19, 1911, P.L. 1055, §1 *et seq., as amended*, 19 P.S. §1051 *et seq.; Commonwealth v. Duff*, 414 Pa. 471, 200 A.2d 773 (1964).

The judgment of sentence at No. 1902 (burglary and larceny) and the order at No. 1907 of 1971 (burglary and larceny) are affirmed. To the extent that either or both of the orders at Nos. 1908 of 1971 (conspiracy) and 1911 of 1971 (conspiracy) provide for periods of probation in excess of 2 years, they are modified by the substitution of 2 years' probation for the incorrect period(s), and as modified are affirmed.

HOFFMAN, CERCONE, and SPAETH, JJ., concur in the result.

SUPREME COURT, U. S.

SEP 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-79

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

*v.*

JESSE W. HOWARD, JR., *Petitioner*

# BRIEF FOR RESPONDENTS IN OPPOSITION

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

D. RICHARD ECKMAN
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## COUNTER-STATEMENT OF ISSUES PRESENTED

1. In the absence of specific objection by petitioner's trial counsel, whether it was basic and fundamental error for the prosecution to introduce testimony that petitioner was advised of his *Miranda* rights when arrested but chose to remain silent and not make any statements and for the judge's comment upon this testimony during his charge to the jury.

2. Whether it was error for the Superior Court to fail to find whether any alleged error was harmless beyond a reasonable doubt when said court did not find any basic and fundamental error.

## COUNTER-STATEMENT OF THE CASE

Petitioner was arrested on July 19, 1971, in Lancaster County, Pennsylvania, and charged with two counts of burglary, two counts of larceny, and one count of conspiracy. He was indicted by the Grand Jury of Lancaster on these charges at Nos. 1895, 1898, and 1900 of 1971. On March 19, 1972, he was tried before Judge William G. Johnstone, Jr., and a jury in the Court of Common Pleas of Lancaster County and found guilty on all counts. Trial counsel, Raymond R. Smith, Esquire, of York County, Pennsylvania, made oral motions for a new trial and in arrest of judgment which he reduced to writing within seven (7) days. However, he failed to file supplemental reasons after the notes of testimony were transcribed, and failed to file a brief or appear and argue the motions, and they were dismissed at bar without argument or opinion. William A. Atlee, Jr., Esquire, was subsequently retained to perfect an appeal to the Superior Court of Pennsylvania, Philadelphia District, from the judgment of sentence. An order of the Superior Court, filed November 16, 1973, affirmed the petitioner's conviction for two counts of burglary, two counts of larceny, and one count of conspiracy. The opinion of the Superior Court was written by Judge Jacobs, with Judges Hoffman, Cercone, and Spaeth concurring in the result. There was no dissenting opinion filed. Subsequently, the Pennsylvania Supreme Court on March 25, 1974, denied petitioner's petition for allowance of appeal from the Superior Court. The petitioner then petitioned for the reconsideration of the denial of the petition for allowance of appeal from the Superior Court. This petition was denied on May 8, 1974.

## REASONS FOR DENYING THE WRIT

**1. In the absence of specific objection by petitioner's trial counsel, whether it was basic and fundamental error for the prosecution to introduce testimony that petitioner was advised of his *Miranda* rights when arrested but chose to remain silent and not make any statements and for the judge's comment upon this testimony during his charge to the jury.**

It may be true that an officer's statement, on direct examination, that petitioner had remained silent when arrested and advised of his rights is objectionable. (N.T. 205-206) *Commonwealth v. Greco*, 227 Pa. Superior Ct. 19 (1974). However, the record reveals that not only was no objection to the testimony made at the time of occurrence, but that petitioner's trial attorney intentionally elicited the same testimony on cross-examination.

"Q. Now, you testified here that you read Mr. Howard his rights and you advised him that anything he was going to say you were going to use against him?
"A. Yes sir.
"Q. And he didn't say anything?
"A. No, sir, he didn't."

Petitioner has not attacked the adequacy of trial counsel. Yet petitioner also challenges the fact that the trial judge, in his charge to the jury, commented on the testimony that the petitioner chose to remain silent. Trial counsel did not make a specific objection to the judge's reference now complained of.

Under Pennsylvania Rules of Criminal Procedure No. 1119(b), "No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires." See *Commonwealth v. Butler*, 442 Pa. 30, 272 A.2d 916 (1971); *Commonwealth v. Watlington*, 452 Pa. 524, 306 A.2d 892 (1973).

It has been held that the failure to object to the admission of evidence and to specific errors in the court's charge will be overlooked in the case of fundamental error, *Commonwealth v. Zapata*, 447 Pa. 322, 290 A.2d 114 (1972), as stated by Jacobs, J. in his opinion in petitioner's case in the Superior Court of Pennsylvania. (See petitioner's brief, pp. 20-21).

> "A jury's awareness through the Commonwealth's testimony of a defendant's silence at time of arrest and constitutional warnings is not, under the circumstances existing in the present case and without more, a defect so fundamental as to affect the merits or justice of the case or to offend against the fundamentals of a fair and impartial trial. *See Commonwealth v. Williams*, 224 Pa. Super. 298, 307 A. 2d 289 (1973). Nor do we believe that the judge's recapitulation of this testimony, which the appellant had succeeded in repeating on cross-examination, was so unfair as to require invalidation of the trial."

It is interesting that the Superior Court felt that the intentional elicitation by trial counsel of the testimony now being objected to, indicated that he felt it was beneficial to his client. The Superior Court felt that the failure of petitioner to say anything, which would aid the prosecution when arrested, may have been considered exculpatory by his counsel in view of the concurrent absence of any items of evidence on his person and the circumstantial nature of the case against him. Since petitioner is not contending that his trial counsel was ineffective, the strategy employed by petitioner's trial counsel had some reasonable basis to effectuate petitioner's interests. *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 603, 235 A.2d 349, 352 (1967).

**2. Whether it was error for the Superior Court to fail to find whether any alleged error was harmless beyond a reasonable doubt when said court did not find any basic and fundamental error.**

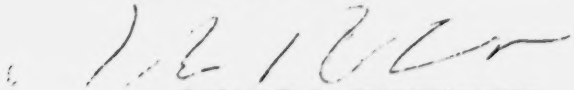
Petitioner's claims that the Superior Court did not determine whether the alleged error, the comment by the prosecution witness as to petitioner's silence at the time of arrest, was harmless error beyond a reasonable doubt. However, since no objection was made to the above testimony, it is only necessary to determine whether an error is harmless error beyond a reasonable doubt when the court first determines that "fundamental and basic error" has been committed. Since the Superior Court of Pennsylvania determined that no fundamental and basic error existed in the present case, it was not necessary for the court to decide whether any error was harmless beyond a reasonable doubt. *Commonwealth v. Davis*, 455 Pa. 466, — A.2d — (1974); *Chapman v. California*, 386 U.S. 18 (1967).

## CONCLUSION

The arguments set forth above show that petitioner's trial counsel elicited on cross-examination that petitioner chose to remain silent after he was advised of his constitutional rights after arrest. Since petitioner does not allege his trial counsel was ineffective, the actions by petitioner's trial counsel had some reasonable basis to effectuate petitioner's interests. No objection was made to the charge wherein the trial judge commented on the complained-of testimony. The Superior Court of Pennsylvania felt that this was not "fundamental and basic" error. Therefore, the Superior Court did not have to determine whether the error was harmless beyond a reasonable doubt.

The Commonwealth accordingly prays that petitioner's Writ of Certiorari be denied.

Respectfully submitted,



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